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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| BRIAN PEREZ,<br>Plaintiff and Appellant,<br>v.<br>CITY OF WESTMINSTER et al.,<br>Defendants and Respondents. | G042965<br>(Super. Ct. No. 30-2009-00121208)<br>O P I N I O N |

Appeal from an order of the Superior Court of Orange County, Glenda Sanders, Judge. Reversed.

John J. Gulino for Plaintiff and Appellant.

Jones & Mayer, Krista MacNevin Jee and James R. Touchstone for Defendants and Respondents.

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## INTRODUCTION

Brian Perez sued his employer for disciplining him in connection with Perez's failure to cooperate with the employer during an internal affairs investigation of another employee. The employer filed a motion to strike the complaint pursuant to Code of Civil Procedure section 425.16 (the anti-SLAPP statute),[1] and the trial court granted the motion. Perez appeals.

Having reviewed the appellate record de novo, we conclude the employer failed to make a prima facie showing that the complaint arises from activity protected by the anti-SLAPP statute. We therefore reverse.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

Perez is a police officer employed by the City of Westminster (the City). Andrew E. Hall, Mitch Waller, Jack R. Davidson, Cliff Williams, and Mark Groh are supervisory and/or management employees of the City's police department.[2]

On November 18, 2007, Perez, along with other City police officers, responded to a disorderly conduct call outside a Westminster bar. Perez observed a suspect being detained. The suspect later complained a police officer (not Perez) struck him in the face.

Perez was interviewed by Williams and Groh on November 25, 2007, as part of the investigation of the excessive force complaint. Perez was not represented by counsel at this interview, and was not given any warnings under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) or *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822 (*Lybarger*). Perez advised Williams and Groh that he had not observed anyone striking

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[1] "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

[2] The City, the City's police department, and individual police officers Hall, Waller, Davidson, Williams, and Groh will be referred to in this opinion collectively as defendants.

the suspect or using excessive force. Perez was then told a videotape of the incident existed, which showed the suspect being struck by one of the officers, and also showed Perez had been close to the incident. Perez was admonished to be "careful" how he answered the questions, and was told "we gotta ask you a pointed question in here . . . Don't think I'm doubting your integrity—but I've got to be specific with what we're asking you on it . . . and the reaso[n] we're trying to pin you down on that, Brian, to be perfectly honest with you, is your description of what you saw officer Stouffer do was inconsistent with several other witnesses and the tape."

Perez was again interviewed on December 10, 2007. At the second interview, he had an attorney present, and was given the *Miranda* and *Lybarger* warnings. In responding to the questions of the investigating officers, Perez again stated he had not seen any act of excessive force used on the suspect, but that did not mean the act had not occurred.

On January 29, 2008, Perez received a notice of intent to terminate his employment, reading, in part: "Though you were not the subject officer in the administrative investigation your comp[l]ete and honest cooperation was required. Your version of the November 18th arrest of Dr. Rubin is inconsistent with the other officers present and the multiple video recordings of the parking lot where the arrest took place[;] it is apparent you were in a position to witness the incident involving Dr. Rubin and Officers Stouffer, Reyes, and Lumba."

Perez appealed the decision to terminate his employment. On March 12, 2008, Chief of Police Hall sent a letter to Perez's attorney, reading, in relevant part: "After careful consideration of information provided by you and Officer Perez . . . , along with detailed review of the investigation report and video images, I have concluded there is insufficient evidence to sustain findings that Officer Perez violated Westminster Police Department Policy and Procedure by knowingly making false or misleading statements during an internal affairs investigation and failing to report improper activities by other

police personnel. Accordingly, the disposition of this matter will be one of 'Not Sustained.' [¶] This finding should not be misunderstood by Officer Perez as exoneration or one of innocence. It is strictly my conclusion the department has failed to meet the evidentiary burden necessary to sustain a finding of severe misconduct."

Although Perez was returned to his employment, he was excluded from the honor guard and the SWAT team, on the ground the internal affairs investigation was causing him "obvious stress and upset and therefore it was not in [his] best interest to continue on these assignments and programs." Hall told Perez's attorney that Perez did not have a promising career with the City's police department because he was perceived as someone who would not cooperate. After the investigation, Perez was never assigned to duty as a field training officer.

On March 20, 2008, Perez filed a written claim with the City pursuant to Government Code section 945.4. The City did not respond. Perez filed a complaint on April 8, 2009.

Defendants filed both a demurrer and an anti-SLAPP motion. Perez responded by filing a first amended complaint. After defendants moved to strike the first amended complaint, Perez filed an opposition to the demurrer and the anti-SLAPP motion.

The trial court granted defendants' anti-SLAPP motion, and determined the demurrer was moot. The trial court's minute order granting the anti-SLAPP motion reads, in relevant part, as follows: "Although a court can refuse to apply the anti-SLAPP statute to a mixed cause of action where the protected activities are merely incidental or collateral to the unprotected activity, here the protected conduct is not merely incidental or collateral to the unprotected activity. The protected conduct forms the main thrust or gravamen of the complaint. [Citation.] [¶] The Police Defendants have made a prima facie showing that the core of each of the causes of action in the complaint arises from the exercise of a protected activity, namely their actions in initiating, investigating and

communicating disciplinary proceedings against Plaintiff Perez. [¶] Although Plaintiff argues that the investigation itself does not form a substantial part of the factual basis for his claims, and he further argues that it is the Police Defendants' post disciplinary-hearing retaliatory conduct that forms the thrust of his complaint, his pleadings belie these assertions. Indeed, Exhibit 1 to Plaintiff's Declaration [the Government Code section 945.4 claim] makes only passing reference to post-hearing retaliation, the causes of action themselves use the term 'wrongful discipline' in their captions, references in the complaint to post-hearing retaliation are minimal and such references are intertwined with alleged wrongful conduct that is protected." Perez timely appealed.

## DISCUSSION

### I.

### *STANDARD OF REVIEW*

In considering an anti-SLAPP motion under Code of Civil Procedure section 425.16, subdivision (b)(1), the trial court engages in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) The moving party bears the burden of

proof on the first issue, while the opposing party has the burden on the second issue. (*Mallard v. Progressive Choice Ins. Co.* (2010) 188 Cal.App.4th 531, 537.)

On appeal, we review the trial court's order granting the anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.) "'We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citation.]" (*Id.* at p. 326.)

II.

*DEFENDANTS FAILED TO ESTABLISH THAT PEREZ'S CLAIMS AROSE FROM DEFENDANTS' PROTECTED ACTIVITY.*

The anti-SLAPP statute protects "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).) This case involves Code of Civil Procedure section 425.16, subdivision (e)(2), as defendants contend the statements occurred "'in connection with an issue being reviewed by an official proceeding.'" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116.).

The investigation regarding the alleged use of excessive force against a suspect on November 18, 2007, and Perez's appeal from the termination of his employment were official proceedings authorized by law. Any statements made during the course of the investigation or the appeal process would be protected by the anti-SLAPP statute. (See *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1544 [internal investigation that department employee had engaged in misconduct and criminal activity was official proceeding authorized by law]; *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1397 [protected activity under the anti-SLAPP statute includes internal employee grievance process].)

Perez contends, however, that his claims arose from the retaliatory conduct by the City after the investigation and appeal processes were over. That retaliatory conduct, on its own, would not be protected activity because it is not a written or oral statement or writing made in connection with an official proceeding. The trial court found the language of the complaint showed its gravamen was the disciplinary process, not the postinvestigation retaliation, and any allegations regarding posthearing retaliation were intertwined with the protected activity.

The first cause of action in the original complaint is captioned "Wrongful Discipline and/or Demotion and retaliation." The key allegations in this cause of action are as follows:

"20. As a proximate result of [Perez]'s refusal to provide false information or falsely report his observations and recollections of the events of November 18, 2007, as alleged herein, [Perez] suffered discipline, including Notice of Intent to Terminate. Thereafter and following [Perez]'s successful challenge of the false and fraudulent factual basis asserted by the defendants as justification for the stated intention to terminate [Perez]'s employment, [Perez] was the subject of retaliation by the defendants, and each of them as set forth herein.

"21. As a further proximate result of the acts of the defendants and the retaliation against [Perez] for [Perez]'s refusal to provide false information to support the defendants' determined result of the investigation of the events of November 18, 2007, [Perez] has suffered harm . . . .

"22. In doing the acts set forth herein, defendants . . . knowingly, willfully and maliciously contrived, falsified, and misrepresented facts and circumstances seeking to justify the ultimate termination of [Perez]'s employment for no reason other than [h]is refusal to give a false account of his observations and recollections of the events of November 18, 2007, in line with the pre-determined outcome of that investigation of these defendants. Thereafter, and following [Perez]'s successful defeat of the defendants' effort to terminate [Perez]'s employment, these defendants retaliated against [Perez] by being certain that he did not receive requested assignments and other employment related assignments that had been routinely made available to him prior to November 18, 2007 . . . . Further, in an effort to punish and retaliate against [Perez] for his refusal to give false and untrue evidence and/or testimony and to punish and retaliate against [Perez] for h[i]s successful challenge of the defendants' effort to terminate [Perez]'s employment, defendant[] HALL informed [Perez] that he did not believe that [Perez] was 'innocent' but that the CITY had simply been unable to prove the false claims asserted against [Perez] thereby making it clear that [Perez] had little, if any, opportunity for promotion or advancement with the Westminster Police Department."

The second cause of action has as its caption, "Wrongful Discipline in Violation of Public Policy." Paragraph 24 of the original complaint, in the second cause of action, reads, in part: "[Perez] is informed and believes and thereon alleges that due solely to [Perez]'s refusal to provide false evidence or testimony in support of the defendants' predetermined outcome of the investigation of the events of November 18, 2007 and, thereafter to retaliate against [Perez] for successfully demonstrating that the defendants' stated intention to terminate [Perez]'s employment was based upon false,

untrue and/or fraudulent information, defendants and each of them took steps to prevent [Perez] from receiving job assignments which had previously been made available to him and refused to allow his participation in job related activities and positions which were routinely made available to him before November 18, 2007."

The third cause of action for breach of the implied covenant of good faith and fair dealing alleges the City breached the implied covenant by, "among other things, contriv[ing] a false and fraudulent basis to terminate [Perez]'s employment with defendant CITY."

The key question before us is whether the causes of action alleged by Perez arise from an act in furtherance of the City's right of petition or free speech. "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

The fact that Perez's lawsuit was filed after protected activity by the City took place within the context of the investigation and appeal process does not mean the anti-SLAPP motion was properly granted. "[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity. The anti-SLAPP statute cannot be read to mean that 'any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under [Code of Civil Procedure] section 425.16, whether or not the claim is *based on* conduct in exercise of those rights.' [Citations.]" (*City of Cotati v. Cashman, supra,* 29 Cal.4th at pp. 76-77 [lawsuit seeking declaration of rent control ordinance's constitutionality did not arise from protected petitioning activity although it followed filing of federal court action alleging ordinance would result in uncompensated regulatory takings]; see also *Clark v.*

*Mazgani* (2009) 170 Cal.App.4th 1281, 1289-1290 [tenant's causes of action based on fraudulent eviction were not subject to anti-SLAPP motion because they did not arise from protected activity, even though the tenant's lawsuit was triggered by the landlord's earlier unlawful detainer lawsuit]; *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1399 [claims by insured against insurer for unfair claims handling did not arise out of insurer's protected activity, although a Department of Insurance investigation and report led to insured's complaint].)

We conclude Perez's claims against defendants do not arise from their petitioning or free speech activities. Perez seeks damages due to defendants' alleged wrongful retaliation after the investigation and Perez's appeal from the threatened termination of his employment were concluded. Perez's claims were unquestionably triggered by the investigation, but they arise from defendants' retaliatory actions against Perez, not from any protected petitioning or free speech activities on their part. Defendants failed to show Perez's claims arose from their protected activities. Therefore, we conclude the trial court erred in granting defendants' anti-SLAPP motion.

Because defendants did not make a prima facie showing that the acts and statements of which Perez complains were protected by Code of Civil Procedure section 425.16, subdivision (e)(2), we need not reach the second step of the analysis—whether Perez established a probability of prevailing on the merits of his complaint. We express no opinion as to whether Perez adequately alleged any cause of action. In particular, defendants' demurrer is not before us on this appeal, as the trial court concluded it was moot when it granted the anti-SLAPP motion. Our opinion is limited to the decision that Perez did not base his causes of action on activity protected by the anti-SLAPP statute.

## DISPOSITION

The order is reversed. Appellant to recover costs on appeal.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.